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The Public Service Loan Forgiveness Program: The Need for Better Employment Eligibility Regulations

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ABSTRACT

A few people have now applied for and obtained tax-exempt debt forgiveness of their federal student Direct Loans under the Public Service Loan Forgiveness (PSLF) program after satisfying the requirements of 10 years of post-October 1, 2007 employment in a “public service job.” While only a relatively small number of people have received debt forgiveness to date, I estimate that as the number of persons eligible ramps up sharply in 2018 and thereafter eventually 200,000 people a year or more will obtain debt forgiveness under the PSLF program, at a total cost to the Treasury of \$12 billion per year or more. Estimates are that up to one-quarter of all employment qualifies as a public service job that will allow the employee to obtain debt forgiveness for these loans.

For such a large and costly program, the precise eligibility criteria are crucial. The statutory definition of a “public service job” is very broad and specifically lists numerous categories of public service, and is in some ways ambiguous. The Department of Education (DOE) in 2008 issued regulations regarding PSLF program employment eligibility, but those regulations have serious deficiencies. First, the regulations improperly define a public service job in a manner that is inconsistent with the statute by

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imposing a “public service organization” employer requirement that is not in the statute. This requirement works to disqualify some statutorily-listed forms of public service employment from debt forgiveness eligibility, in particular public services employment provided on behalf of for-profit businesses or certain non-profit employers, and also improperly allows eligibility for debt forgiveness for some employees of private non-profit employers who are not employed to provide a qualifying public service. Second, the regulations fail to clarify vague statutory language regarding what constitutes “public” service, most importantly regarding the scope of “public interest law services.”

The DOE has also recently rescinded several previously granted certifications of employment as qualifying on the basis of a newly imposed restrictive “primary purpose of the employer” requirement that is not in the governing statute nor in the DOE regulations, actions that have been challenged in court by the American Bar Association. Even if this restriction is upheld, which appears unlikely, there is a strong argument that the DOE should be estopped from rescinding prior certifications.

In order to avoid unnecessary litigation once the expected large number of applications for debt forgiveness begin to be filed in 2018 and afterwards, I recommend that the DOE first seek Congressional action to clarify the contours of the PSLF program’s employment eligibility statute. Further, while awaiting such action, the DOE should rescind its public service organization eligibility requirement which is inconsistent with the statute, clarify that there is no primary purpose of the employer requirement, and provide much more detailed guidance regarding the contours of the various statutorily-specified forms of qualifying public service, especially public interest law service. If PSLF program employment eligibility is to be either narrowed or expanded, this should be done through appropriate legislation, and not through unauthorized and covert DOE actions.

INTRODUCTION

Under the Public Service Loan Forgiveness program (PSLF program) a person who has taken out Federal Direct Loans to finance their higher education, and thereafter enrolls in a qualifying debt repayment plan, works for ten years in a “public service job” after October 1, 2007, and also makes all of the required payments on this debt over that time period, will then be entitled to have the remaining principal and interest due on his debt forgiven.¹ In addition,

1. 20 U.S.C. § 1087e(m) (2012). Throughout this Article I will refer to the

that forgiven debt is excluded from gross income for income tax purposes, unlike debts forgiven under the other federal income-based repayment plans which are regarded as taxable cancellation of indebtedness income.²

The phrase “public service job” is defined very broadly by the statute establishing the PSLF program as including any “full-time” employment by certain employers, as well as including employment providing any of a number of specifically-listed public services on behalf of other employers.³ It has been estimated that approximately one-quarter of all jobs in the economy qualify as “public service jobs” under this broad definition.⁴ People first started meeting the ten years of post-October 1, 2007 public service requirement for obtaining debt forgiveness under the PSLF program in October of 2017. While relatively few people have so far qualified, I have estimated in another article that once the program ramps up to a steady-state number of persons regularly becoming eligible for debt forgiveness, as many as 200,000 or more people each year will seek forgiveness. Those persons are predicted to have an average amount of remaining student loan debt of about \$60,000, which could

statutory Public Service Loan Forgiveness provisions as a “program” in accordance with commonly accepted parlance. In actuality, those provisions do not really establish a separate loan repayment “program,” but only create a special accelerated debt forgiveness mechanism with particular eligibility requirements that complements the various federal student loan repayment plans.

2. I.R.C. § 108(f)(1) (2012). This exclusion from gross income does not apply for debts forgiven under other federal income-based student loan debt repayment plans.

3. 20 U.S.C. § 1087e(m)(3)(B).

4. U.S. GOV’T ACCOUNTABILITY OFF., GAO-15-663, *FEDERAL STUDENT LOANS: EDUCATION COULD DO MORE TO HELP ENSURE BORROWERS ARE AWARE OF REPAYMENT AND FORGIVENESS OPTIONS* 27 (2015) (citing Bureau of Labor Statistics figures that 24.7% of US workers—32.5 million out of a total of 131.7 million US workers nationwide—were employed in PSLF-qualifying public service jobs); JASON DELISLE, BROOKINGS INST., *THE COMING PUBLIC SERVICE LOAN FORGIVENESS BONANZA* 3 (2016), <https://www.brookings.edu/research/the-coming-public-service-loan-forgiveness-bonanza/>.

cost the Treasury at least \$12 billion per year.⁵

Given how large and costly this program will become over the next few years, it is crucial that the eligibility criteria are made clear. I set forth below in its entirety the statutory definition of a qualifying “public service job”:

(B) Public service job The term “public service job” means—

(i) a full-time job in emergency management, government (excluding time served as a member of Congress), military service, public safety, law enforcement, public health (including nurses, nurse practitioners, nurses in a clinical setting, and full-time professionals engaged in health care practitioner occupations and health support occupations, as such terms are defined by the Bureau of Labor Statistics), public education, social work in a public child or family service agency, public interest law services (including prosecution or public defense or legal advocacy on behalf of low-income communities at a nonprofit organization), early childhood education (including licensed or regulated childcare, Head Start, and State funded prekindergarten), public service for individuals with disabilities, public service for the elderly, public library sciences, school-based library sciences and other school-based services, or at an organization that is described in section 501(c)(3) of title 26 and exempt from taxation under section 501(a) of such title; or

(ii) teaching as a full-time faculty member at a Tribal College or University as defined in section 1059c(b) of this title [20] and other faculty teaching in high-needs subject areas or areas of shortage (including nurse faculty, foreign language faculty, and part-time faculty at community colleges), as determined by the Secretary.⁶

This definition is linguistically awkward in that it juxtaposes two very different bases under which employment will qualify as a “public service job.” First, it includes employment by certain employers whose full-time employees will qualify for the PSLF program regardless of their job duties, specifically governments and Internal Revenue Code

5. Gregory Crespi, *Will the Public Service Loan Forgiveness Program Ever Forgive Any Loans?*, 51 Conn. L. Rev. (forthcoming Jan. 2019) (manuscript at 38–39), <https://ssrn.com/abstract=2978111>. To keep this sum of money in proper perspective, it is less than one-half of the annual Pell Grant expenditures. U.S. DEPT OF EDUC., *FEDERAL PELL GRANT PROGRAM 2016–2017 END OF YEAR REPORT* tbl.1 (2017), <https://www2.ed.gov/finaid/prof/resources/data/pell-data.html>.

6. 20 U.S.C. § 1087e(m)(3)(B).

(Code) section 501(c)(3) organizations that are also tax-exempt under Code section 501(a). Second, it lists several types of public service employment that will qualify if that employment is done on a full-time basis, regardless of who the employer is and regardless of what other activities the employer may engage in. These listed public services importantly include military service, law enforcement, public health, public interest law services, public education, and teaching in high-needs subject areas as determined by the Department of Education (DOE) Secretary, among other several other forms of public service.

This cumbersome definition also suffers from both vagueness and ambiguity problems that call for clarification by the DOE, the agency charged with administering the PSLF program. The available legislative history of this definition is quite sparse and does not provide much useful guidance.⁷ In 2008, the DOE issued regulations implementing the program;⁸ but as I will later discuss, their regulations as to what employment will qualify as a “public

7. In the House of Representatives version of the College Cost Reduction Act of 2007, which contained the original version of the PSLF program eligibility requirements, the requisite employment was defined in Section 132 as a “public sector job,” and included most of the employment categories later adopted into law. H.R. REP. NO. 110-210, at 14 (2007) [hereinafter COLLEGE COST REDUCTION ACT OF 2007]. That language was intended to provide loan forgiveness to “public sector employees,” *id.* at 39, 71–72, but the Report did not define what was meant by the “public sector” phrase, in particular whether it extended beyond government employees. In the later Conference Report the Senate amendment containing the current “public service job” definition was substituted for the earlier House “public sector job” definition. H.R. REP. NO. 110-310, at 18, 47–48 (2007) (Conf. Rep.). That amendment was explained as creating a loan forgiveness plan for “public service employees” rather than for “public sector employees” as under the House version, *id.* at 47–48, but the Conference Report did not explain whether this change in phrasing was intended as an expansion of eligibility, and if so what was the rationale for this expansion of eligibility, or what were the precise contours of eligibility outside of public sector or Code section 501(c)(3) organization employment.

8. 34 C.F.R. § 685.219 (2017). These regulations were issued by the DOE on October 23, 2008. *See generally* 73 Fed. Reg. 63,232–63,259 (Oct. 23, 2008) (to be codified at 34 C.F.R. 674, 682, and 685).

service job”⁹ need much more detailed elaboration as to the contours of several types of qualifying public service employment; they are also inconsistent with the governing statute in some important regards. Let me set out below some of the many issues that the PSLF program eligibility statute raises that require regulatory clarification:

1) What are the requirements for a job to be “full-time?”;

2) How broadly is “government” to be defined? For example, does “government” include not only federal, state, and local governments but also domestic intergovernmental or public regional agencies, and/or quasi-public local organizations supported in part by public funding, or only direct government employees? Does “government” also include foreign governments and/or international intergovernmental organizations?;

3) Given that all full-time employment by government is denoted by the statute as a qualifying public service job, what sorts of non-governmental employment was intended to be encompassed by the phrases “emergency management,” “military service,” “law enforcement,” and “public safety” given that these kinds of activities are overwhelmingly carried out by employees of governmental bodies that are, for that reason alone, necessarily doing public service jobs? Are these phrases intended to cover employment by private contractors that are not part of government, but whose activities are closely integrated with those of a governmental body providing one or more of these public services? Or should those phrases be interpreted as redundant, as mere surplusage whose content is already necessarily included within “government” employment?;

4) With regard to employers that are neither governments nor Code 501(c)(3) organizations, but provide one or more of the statutorily-listed public services, must an employee work full-time in the provision of one or more of

9. 34 C.F.R. § 685.219(b).

those public services to qualify as having a public service job, or will any full-time employment for that employer qualify? Does full-time public service employment for such an employer qualify as a public service job when the employee provides those services outside of the United States? Does it matter for this question if the employer does not operate in the United States at all?;

5) Not all of the forms of qualifying service specified in the statutory public service job definition are prefaced by the term “public,” but many of them are, specifically public safety, public health, public education, public interest law services, public service for individuals with disabilities, public service for the elderly, and public library services. All of these services are necessarily provided to members of the public, regardless of who provides the services. Given this fact, under what circumstances, if any, would any of these services *not* be regarded as “public” services? This determination would be important for services provided by a person who is not an employee of either a governmental body or a Code 503(c)(3) organization whose full-time work would automatically qualify as a public service job;

6) There are many questions raised by the statute specifically with regard to “public interest law services.” First, is the (“including...”) explanatory parenthetical that lists several forms of public interest law service intended to be exclusive, or merely illustrative? If it were intended to only be illustrative of the nature of such services, which appears more likely, what services will qualify as “law” services beyond the obviously included services of a licensed attorney providing legal advice or representation for clients? Would, for example, paralegals working with attorneys to provide such advice or representation, or employees of business firms that are employed to provide document storage and retrieval services or other support services for lawyers and law firms, perhaps among numerous other non-lawyer clients, be providing qualifying “law” services? And given that all legal services benefit some member(s) of the

public, sometimes unfortunately at the expense of other members of the public (consider an attorney representing a tenant in an eviction proceeding, to the disadvantage of the tenant's landlord), what legal services will qualify as "public interest" legal services? Is there a particular defined group of people to whom providing legal assistance is to be regarded as in the public interest? Does whether legal services are in the "public interest" depend wholly or in part upon whether the legal services are publicly or privately funded? What if the legal services are partially or wholly funded by donations rather than by the person benefitted by those legal services or by public sources? Does that make them public interest legal services?;

7) With regard to "public education," does "education" include only classroom instruction, or does it also include other forms of outreach, online or in-person, intended to provide people with information and education? And when is education "public" as opposed to "private?" Does education partly funded by donations and tuitions *and* partly funded from public sources qualify as public education?

There are other questions that this terse and strikingly broad statutory definition of a qualifying public service job raises, but I think I have made my point. Congress has passed an extremely broad and general framework for defining public service jobs which could extend to cover tens of millions of people. This general framework obviously needs to be supplemented with detailed regulatory guidance from the DOE for many of these categories, particularly with regard to the contours of the various qualifying public service employment categories when those services are performed by persons who are neither government employees nor Code section 501(c)(3) organization employees. But as I will discuss below, the DOE's 2008 regulations for the most part, unfortunately, fail to provide this guidance. In addition, the regulations are, in some important aspects, inconsistent with the statute. They are sometimes too narrow in their articulation of the employment eligibility criteria and, in

other ways, too broad.

As people have now started qualifying for debt forgiveness, and because the number of people seeking debt forgiveness will probably quickly grow to a veritable flood of 200,000 or more persons per year, the need for more detailed regulatory clarification from the DOE that is consistent with the statutory mandate as to eligibility is becoming rather urgent. If the DOE does not issue such new regulations in a timely manner, then there is likely to arise class action litigation initiated by disappointed applicants or other persons regarding various employment eligibility issues that will force the DOE to do this anyway, so it is better done sooner rather than later.

In Part I of this Article, I will provide more background information about the PSLF program and about the large scale on which debt forgiveness will likely be sought under this program, and about some of the policy issues this will raise. In Part II of this Article, I will set forth and critique the DOE's existing regulations that relate to employment eligibility for debt forgiveness. In Part III, I will discuss ongoing litigation between the DOE and the American Bar Association (ABA) regarding a recent attempt by the DOE to narrow the program's employment eligibility criteria, without either seeking statutory amendment or formally promulgating new regulations, by rescinding prior assurances given individuals that their employment would qualify for debt forgiveness under the program. In Part IV, I will recommend some regulations that the DOE might consider adopting in order to clarify what would constitute a qualifying "public service job," and that a particular existing regulation be rescinded. Part V will present a brief conclusion.

Finally, as has been anecdotally recognized for some time and now is well documented in a recent Consumer Financial Protection Bureau report, even before borrowers have qualified for and start filing applications for debt forgiveness under the PSLF program, they have encountered

a number of significant problems in their relationships with their loan servicers that have been designated to manage their loans by the DOE.¹⁰ This short Article will only focus upon the program's employment eligibility criteria and will not address these other concerns; however, the DOE should also attempt to address these loan servicer relationship difficulties in a timely and effective manner.

I. THE PSLF PROGRAM

Under the PSLF program, people will be eligible to obtain forgiveness of their remaining Direct Loan debts after completing 10 years of post-October 1, 2007 qualifying public service employment and debt repayments. The first few persons to qualify for debt forgiveness did so in October of 2017. Beginning in 2012, the DOE has provided an annual Employment Certification Form,¹¹ and recommends that persons who may later wish to avail themselves of the PSLF program's debt forgiveness, once they become eligible, file that application form annually, on a voluntary basis, in order to have their prior year's employment certified in advance as qualifying as a "public service job" so that when they later apply for debt forgiveness they need not have any lingering concerns as to their eligibility. The DOE has designated FedLoan Servicing as its contractor to review such applications and grant or deny such certifications, and then to take over servicing of the loans of those persons whose

10. See generally CONSUMER FINANCIAL PROTECTION BUREAU, STAYING ON TRACK WHILE GIVING BACK (2017), http://files.consumerfinance.gov/f/documents/201706_cfpb_PSLF-midyear-report.pdf. The problems with loan servicers encountered by borrowers include: problems enrolling in and recertifying income under their repayment plans, problems relating to payment processing and allocation for borrowers with multiple loans, problems obtaining the information needed to avoid defaults, *id.* at 18, and a broad range of problems relating specifically to the PSLF program. *Id.* at 27–43.

11. U.S. DEPT OF EDUC., PUBLIC SERVICE LOAN FORGIVENESS: EMPLOYMENT CERTIFICATION FORM, OMB NO. 1845-0110 (2012), <http://studentaid.ed.gov/sa/sites/default/files/public-service-employment-certification-form.pdf>.

application for certification has been approved.¹² Over half a million people have had one or more periods of employment certified as qualifying through this procedure,¹³ with over 200,000 people first obtaining certification in 2016 alone.¹⁴

I have estimated that a very large number of people will eventually seek debt forgiveness after ten years of public service employment,¹⁵ many more than were originally expected to utilize this program when it was first enacted,¹⁶ with the annual number of applications for debt forgiveness likely growing very rapidly in 2018 and thereafter to as many as 200,000 or more.¹⁷ Moreover, while those persons who have taken out only undergraduate student loans will, in most cases, have relatively modest amounts of remaining debt to forgive after ten years of making repayments (generally no more than approximately \$25,000)¹⁸ many

12. *Id.*

13. FEDERAL STUDENT AID, U.S. DEPT' OF EDUC., PUBLIC SERVICE LOAN FORGIVENESS EMPLOYMENT CERTIFICATION FORMS (2016), <http://studentaid.ed.gov/sa/about/data-center/student/portfolio>. As of the fourth quarter of 2016 a total of 552,931 borrowers have had at least one employment certification application approved. *Id.*

14. *Id.*

15. I have estimated that eventually approximately 200,000 or more people each year will file for debt forgiveness under the PSLF program. Crespi, *supra* note 5, at 38–39.

16. At the time of enactment of the Public Service Loan Forgiveness Program, the Congressional Budget Office estimated that eventually 50,000 people each year would seek debt forgiveness under the program. H.R. REP. NO. 110-210 at 72.

17. Crespi, *supra* note 5, at 37–39.

18. The federal government limits Direct Loan eligibility to \$31,000 for undergraduate education, although it has increased that limit to \$57,500 for those undergraduates who qualify as independent and not financially supported by their parents. *Id.*

Consider an example I have presented in another article: Consider the circumstances of a typical person who graduates from an undergraduate program with the average amount of \$30,000 of Direct Loan debt now owed by undergraduate borrowers, at a typical 5% overall annual interest rate, and has a spouse and child, and then takes a qualifying public service position with a \$45,000 starting salary, and then enrolls in the Pay As You Earn (PAYE) loan

lawyers and doctors have taken on much larger, six-figure loan debts to finance their undergraduate and graduate education, and then will have earned relatively modest salaries in the early years of their careers in public service jobs, leading to minimal or often even negative amortization of their loan debts during the qualifying ten-year period of employment. Those persons consequently will have very large amounts of debt forgiven, often more than \$200,000.¹⁹

repayment plan. Under that plan this person will be required to make annual repayments of only 10% of the difference between their adjusted gross income and 150% of the poverty level wage for a person with a family of that size. For that person their annual payment obligation would be approximately $(\$45,000 - \$30,000) \times 10\% = \$1,500$ per year. This would be just enough to meet the annual interest payments on their loan debt of $\$30,000 \times 5\% = \$1,500$. In succeeding years, with modest annual raises and corresponding modest increases in their annual payment obligations under the PAYE plan, that person would begin to amortize their principal debt, but only by a few hundred dollars per year. After ten years that person would still have on the order of \$25,000 or so of debt to be forgiven. Crespi, *supra* note 5, at 18 n.30. However, an independent undergraduate borrower who may have borrowed as much as \$57,500 in Direct Loans, may well have as much as \$50,000 or more of remaining debt at the time of debt forgiveness.

19. Consider again an example I have presented in another article: "Consider the circumstances of a typical person who graduates from law school with a combined undergraduate and law school Direct Loan debt load of \$150,000, at a typical 6% overall annual interest rate that reflects the higher interest rate charged graduate school borrowers compared to undergraduates. Assume again that this person also has a spouse and child, and then takes a qualifying public service position as an attorney with a \$55,000 starting salary, and then enrolls in the PAYE loan repayment plan. Under that plan this person will be required to make annual repayments of only 10% of the difference between their adjusted gross income and 150% of the poverty level wage for a person with a family of that size. For that person their annual payment obligation would be approximately $(\$55,000 - \$30,000) \times 10\% = \$2,500$ per year. This would be far short of the amount needed just enough to meet the annual interest payments on their loan debt of $\$150,000 \times 6\% = \$9,000$. Their debt would therefore increase by $\$9,000 - \$2,500 = \$6,500$ that first year. In succeeding years, with modest annual raises and corresponding modest increases in their annual payment obligations under the PAYE plan, the amount of unpaid interest that would accrue would gradually reduce, but the negative amortization would likely persist for the entire ten-year period, leading to a total principal plus accrued interest debt of over \$200,000 at the time of debt forgiveness." Crespi, *supra* note 5, at 18 n.33.

A medical school graduate with similar initial debt and family circumstances will be in essentially the same position as the law school graduate discussed above, except for the fact that they would be likely to receive a substantial salary

All of this forgiven debt will cost the federal Treasury a very substantial sum—perhaps as much as \$12 billion per year or more.²⁰

The Obama Administration in its final year showed some concern over the growing recognition that there would be a very significant cost to the federal government from large numbers of people having substantial debts forgiven under the PSLF program, and that these benefits would be regressive in incidence and skewed heavily towards mid-career lawyers and doctors. For these reasons, the Administration included in their final budget proposal a recommendation that the amount of future Direct Loan debt that could be forgiven be prospectively limited to \$57,500—the amount of Direct Loan debt that could be incurred by an independent undergraduate borrower.²¹ This limitation would gradually reduce the costs of the program over time as it phased in, and would immediately reduce the attractiveness of the program for prospective lawyers, doctors, and other persons considering expensive graduate school programs without significant financial aid. This proposal, however, was never enacted into law.

A second indication of budgetary concern was shown by the Obama Administration in 2016 when the DOE retroactively rescinded a number of employment certifications that would have qualified people for the PSLF program. The certifications were made by FedLoan Servicing, a contractor retained by the DOE to evaluate applications, service the loans of the persons certified, and

increase after completion of their internship for the last three years of their ten-year public service period, perhaps even enough to repay some of the accrued interest from the seven years of pronounced negative amortization. *Id.* at 19 n.36.

20. I have estimated that the annual costs of debt forgiveness under the PSLF program will eventually become as large as \$12 billion per year, or even higher, as 200,000 or more people each year seek forgiveness of an average amount of debt of \$60,000 apiece. *Id.* at 39–40.

21. U.S. DEPT OF EDUC., FISCAL YEAR 2016 EDUCATION BUDGET SUMMARY AND BACKGROUND INFORMATION (2016), <https://www2.ed.gov/about/overview/budget/budget16/summary/16summary.pdf>.

state that a period of their employment qualified them for the PSLF program. In 2016, however, the DOE determined that several of these certifications made through FedLoan Servicing had been certified in error and the employment did not, in fact, qualify as a public service job; these rescission notices eventually led to a lawsuit being filed against the DOE by the ABA, which I will later discuss.²²

The Trump Administration has shown similar concerns regarding the large costs of the PSLF program by including in their initial May 2017 budget proposal a recommendation that the program be prospectively eliminated entirely for most Direct Loans taken out after July 1, 2018.²³ This proposal did not, however, more aggressively recommend that the program be retroactively eliminated for existing Direct Loan borrowers, nor that the current tax exemption provided for debts that will be forgiven under the program be eliminated.²⁴ But given the estimated \$12 billion per year or more that the PSLF program will cost the Treasury,²⁵ and given the regressive distribution of the program's benefits being heavily skewed in favor of relatively affluent mid-career doctors and lawyers,²⁶ whether or not the current Trump Administration proposal for prospective repeal is ever adopted once the PSLF program ramps up for existing Direct

22. See *infra* Part III.

23. The Trump Administration's first proposed Department of Education budget calls for ending the PSLF program as part of an overall attempt to reduce the DOE's budget by \$9.2 billion, or 13.6% of the current approved level of spending. OFFICE OF MGMT. & BUDGET, BUDGET OF THE U.S. GOVERNMENT: A NEW FOUNDATION FOR AMERICAN GREATNESS, FISCAL YEAR 2018, 20, 33 (2017), <https://www.whitehouse.gov/wp-content/uploads/2017/11/budget.pdf> [hereinafter Trump Proposed Budget (2017)]; Emma Brown, et al, *Trump's first full education budget: Deep cuts to public school programs in pursuit of school choice*, WASH. POST (May 17, 2017), https://www.washingtonpost.com/local/education/trumps-first-full-education-budget-deep-cuts-to-public-school-programs-in-pursuit-of-school-choice/2017/05/17/2a25a2cc-3a41-11e7-8854-21f359183e8c_story.html.

24. Trump Proposed Budget (2017), *supra* note 23.

25. Crespi, *supra* note 5, at 40.

26. *Id.* at 41.

Loan borrowers and becomes more visible and politically salient, new efforts may be made by the Trump Administration (or a later Administration) or members of Congress for a more aggressive retroactive curtailment or termination of its debt forgiveness benefits or of the tax exemption for those benefits. If so, the issue of retroactivity will present a sharp tension between the expectations of hundreds of thousands to millions of Direct Loan borrowers regarding eventually having their remaining debts forgiven, without tax consequences, and the legitimate public concerns regarding the large cost and regressive incidence of the benefits of the program. Whether an attempt to retroactively terminate the PSLF program by statute or to retroactively eliminate the tax exemption for forgiven debt could be accomplished consistent with contract law principles and Constitutional limitations is a close and difficult question, one that I have addressed in some detail in a separate article.²⁷

But for now, while the current PSLF program is in force and the crush of debt forgiveness applications is soon to begin, it is incumbent upon the DOE to make as clear as possible and in a manner consistent with the governing statute what forms of employment will qualify as a public service job that will eventually lead to debt forgiveness. Let me turn now to the existing DOE program eligibility regulations.

II. THE CURRENT DOE EMPLOYMENT ELIGIBILITY REGULATIONS

In October of 2008, the DOE issued PSLF program-related regulations.²⁸ Those regulations include a number of provisions relating to program employment eligibility. First of all, the regulations define “full-time” employment as the

27. See generally *id.*

28. 34 C.F.R. § 685.219. These regulations were issued by the DOE on October 23, 2008. 73 Fed. Reg. at 63,232–63,259.

greater of 1) an annual average of 30 hours per week, 2) an average of at least 30 hours per week for an employment period of at least eight months, or 3) the number of hours per week the employer regards as full-time employment.²⁹ This definition, while somewhat arbitrary, is reasonable and consistent with other definitions of full-time employment elsewhere in federal law. The regulations also define "government employee" narrowly but sensibly as an individual who is employed by a local, State, Federal or Tribal government, but not by foreign governments or by domestic or international intergovernmental agencies.³⁰

This is all clear enough and consistent with the statute. However, the DOE regulations then depart from the statutory framework when they define an entity that they label a "public service organization," an entity that is not referred to anywhere in the statutes creating the PSLF program.³¹ A public service organization is defined by those regulations in a complicated manner to include 1) government organizations, 2) public child or family service agencies, 3) non-profit organizations qualifying under Internal Revenue Code (Code) section 501(c)(3), and qualifying for tax exemption under Code section 501(a), *but not* non-profit organizations that engage in religious

29. 34 C.F.R. § 685.219(b).

30. *Id.*

31. The DOE claimed when it issued its 2008 regulations that "the definition of 'public service organization' is derived from the statutory definition of public service job in section 455(m)(3)(B) of the HEA." 73 Fed. Reg. 63,232 (Oct. 23, 2008). However, the linkage of this regulatory definition to the statute is untenable because as I have noted above, that statute refers only to types of public service employment and does not refer to types of qualifying employers, with the exception of governments or Code section 501(c)(3) organizations. The DOE also claims that the definition of a public service organization is "intended to identify broad categories of eligible jobs rather than define specific jobs under those categories." *Id.* However, as I have discussed, that definition does not identify or otherwise clarify the nature of either categories of jobs or specific jobs, but instead only limits who can be an employer that can provide qualifying public service jobs, and does so in a manner inconsistent with the governing statute that does not impose any such limits.

activities except those unrelated to religious instruction, worship services or any form of proselytizing, 4) Tribal colleges or universities, and 5) private organizations that provide any one of a list of public services including, among several other services, military service, public safety, law enforcement, public interest law services, or public education, *but not* businesses organized for profit, labor unions, or partisan political organizations, and that are not organizations engaged in religious activities unless the qualifying public service activities are unrelated to religious instruction, worship services, or any form of proselytizing.³² In short, a “public service organization” is defined essentially to include only governments and non-profit entities, and with certain non-profit entities such as labor unions, partisan political organizations, and some religious organizations excluded.

Given the statutory definition of a public service job, however, there is no need for the DOE to define by regulations a “public service organization.” Let me explain this point. First, any full-time employment by government, or by a Code section 501(c)(3) organization that is also tax-exempt under Code section 501(a), qualifies under the statute as a public service job regardless of the specific nature of the employment. There is no requirement for full-time employment by government or by a Code section 501(c)(3) organization to qualify as a public service job that the employer qualify as a public service organization, or that the employee of that organization be involved in any way in providing any of the statutorily-listed public services on behalf of that organization.

Second, and just as importantly, employment by any non-governmental or non-Code section 501(c)(3) organization also qualifies under the statute as a public service job *if it consists of a listed public service activity, regardless of who the employer is, and regardless of what other activities the*

32. 34 C.F.R. § 685.219(b).

employer may engage in. The statutory definition of a public service job refers only to the various public services included, and not to the nature of the organization providing those services. In addition, if an employee of such a non-governmental, non-Code section 501(c)(3) organization does *not* work full-time providing a statutorily-listed public service, then under the statute that person *would not be performing a public service job even if that employer qualifies as a public service organization.* So why does the DOE need to define a “public service organization” when all full-time employment by a government or by a Code section 501(c)(3) organization is already covered under the statute as a public service job, and when for full-time employees of any other employer the statute makes clear that the nature of the employer is not relevant for determining public interest job status, but only the nature of the services performed by the employee?

The DOE’s intent in defining this seemingly spurious public service organization category is unclear. On one hand, the definition operates to narrow eligibility for debt forgiveness in some significant regards, but does so in a manner that is inconsistent with the governing statute. On the other hand, it also operates to broaden eligibility for debt forgiveness in some regards, but again in a manner that is inconsistent with the statute. The DOE, by defining this entity, appears to have imposed its own judgment as to what forms of employment should qualify as a public service job, focusing heavily upon the nature of the employer without paying much respect to the statutory definition that—except for government or Code section 501(c)(3) employers—instead focuses upon the nature of the services provided.

Let me first address the manner in which this DOE definition of a public service organization inappropriately narrows debt forgiveness eligibility. Several of the other eligibility regulations that were issued at the same time utilize this definition. First, the regulations narrowly define “employee or employed” as referring only to an individual

“who is hired and paid by a public service organization,”³³ and not to employees of other organizations. There is, however, no statutory basis for this narrow definition of employment which excludes employees who are employed to perform any of the statutorily-listed forms of public service by employers who do not meet the definition of a public service organization. The regulations then limit “law enforcement” service to services performed by an employee of a public service organization,³⁴ thus possibly similarly excluding some law enforcement public service employment from qualifying.³⁵

Perhaps most importantly, the regulations then define “public interest law” as “legal services provided by a public service organization that are funded in whole or in part by a local, State, Federal or Tribal government.”³⁶ This regulatory definition has two obvious major problems. First, as discussed above, the governing statute does not place any type-of-employer restrictions regarding when employment to provide public interest law services will qualify as a public service job. Second, the governing statute also does not place any source-of-funding restrictions on what would qualify as public interest law services.

The DOE regulations, through this public service organization definition, delineate what constitutes a public service job more narrowly than does the governing statute. In particular, the definition of a public service organization denies eligibility to people who are employed to provide statutorily-listed public service activities on behalf of non-profit organizations that are engaged in certain religious

33. *Id.*

34. *Id.*

35. This restrictive regulation is redundant given that such persons would not even qualify as “employed” under the regulations’ “employee or employed” definition. *See id.*

36. *Id.*

activities,³⁷ and to people who are employed to provide statutorily-listed public service activities on behalf of any of several very common types of private organizations, including for-profit businesses, labor unions and partisan political organizations, and certain religious organizations.³⁸ Moreover, as noted above, the regulations not only deny eligibility to those persons who provide public interest legal services on behalf of their employer if that employer is one of the above noted employers that does not qualify as a public service organization, but they also deny employees who provide legal services for public service organizations if none of the funding for those services is obtained from a governmental body.³⁹

Even if the governing statute did confer discretion upon the DOE to selectively impose type-of-employer restrictions regarding what forms of public service employment would qualify as public service jobs, the rationale for the particular employer exclusions imposed by the DOE is unclear. A for-profit business may choose to have some of its employees work full-time to provide statutorily-listed public services for longer-term firm reputational purposes or to satisfy the perceived moral obligations of its shareholders, managers, or employees, perhaps for a profit but perhaps also even if it is not immediately profitable to do so.⁴⁰ Those public services would be just as valuable to the persons benefitted as if the services had been provided by a governmental body or by a non-profit organization. Similarly, labor unions, partisan political organizations and religious organizations may each have their own motivations for having some of their employees provide statutorily-listed public services that are of value to the persons benefitted. The governing statute

37. *Id.* § 689.219(b)(3)(ii).

38. *Id.* § 689.219(b)(5)(ii).

39. *See id.* § 689.219(b)(2).

40. For example, a law firm may assign one or more of its attorneys to do a substantial amount of public interest law work on a pro bono basis.

simply places no restriction upon public service employment engaged in on behalf of such employers from qualifying as a public service job, nor invites the DOE to do so.

One could argue that the statutory PSLF program employment eligibility criteria are too broad and should be narrowed so as to exclude employees who provide public service for certain employers, perhaps precisely those for-profit employers and the particular non-profit employers that are excluded by the DOE's public service organization definition.⁴¹ Congress could be fairly criticized for defining a "public service job" in a somewhat vague and ambiguous manner, and for providing very little clarifying legislative history,⁴² and has thereby put the DOE in a difficult regulatory position. In an ideal world Congress would now adopt a clarifying amendment which would either: 1) make it even more clear than the statute now does that eligibility for debt forgiveness is based on the nature of the services provided, and not the nature of the employer, for non-governmental and non-Code section 501(c)(3) employers, 2) amend the statute to explicitly embrace the DOE's public service organization-related employment eligibility criteria for those employers, or 3) impose some other set of clear employment eligibility requirements relating to employment by non-governmental and non-Code section 501(c)(3) employers. But given the extreme partisan polarization of Congress at this time, however, such a clarifying amendment is unlikely, particularly since it would have significant revenue implications. For the same reason, it is simply not credible to regard the Congressional inaction on this matter since 2008 as being an implicit endorsement of the DOE's regulatory approach.

The DOE policymakers likely believe that the agency is doing the best job that it can with its current regulations, given the vagueness and ambiguities of the eligibility

41. Crespi, *supra* note 5, at 25–26.

42. See COLLEGE COST REDUCTION ACT OF 2007, *supra* note 7.

statute. One could argue that given the current reality of persistent Congressional gridlock it would be better if executive branch agencies departed from particular statutory constraints when, in light of their special expertise, they determined that those statutory constraints are unwise, given that Congress could certainly rein in such actions if it chooses to do so. But, absent such a radical departure from conventional separation of power understandings, if there is to be a curtailment of public service job eligibility imposed beyond the current statutory definition, including the employment eligibility limitations that the DOE favors imposing through its public service organization employer requirement, this curtailment should be accomplished by statutory amendment and not by an unauthorized DOE departure from the statutory definition.

While the public service organization definition issued by the DOE in its regulations so limits eligibility in a manner inconsistent with the statute, on the other hand the regulations also work to improperly broaden eligibility beyond the outer statutory limits, in some regards, by treating all persons who work full-time for public service organizations as having a public service job,⁴³ even if those persons are not employed by a government or by a Code section 501 (c)(3) organization, *and* are not involved in the provision of a statutorily-listed public service. This is again inconsistent with the statute, which clearly requires for a public service job that the job involves full-time employment “in” one or more of those public services if the employer is not a government nor a Code section 501(c)(3) organization,⁴⁴

43. “The specific job that you perform does not matter, as long as you are employed by an eligible public service organization.” Dep’t of Educ., *Public Service Loan Forgiveness: Questions and Answers for Federal Student Loan Borrowers*, FED. STUDENT AID, (December 2015), <https://studentaid.ed.gov/sa/repay-loans/forgiveness-cancellation/public-service/questions> [hereinafter DOE Questions and Answers]. “A borrower may obtain loan forgiveness under this program if he or she...(ii) is employed full-time by a public service organization [when the 120 required payments are made].” 34 C.F.R. § 685.219(c).

44. 20 U.S.C. § 1087e(m)(3)(B)(i).

and not merely employment in other, wholly unrelated capacities by an organization of that sort that happens to have some other employees providing public service. Once again, unless one endorses aggressive regulatory departures from statutory constraints as a modern accommodation to consistent Congressional gridlock, this question would be best addressed by Congress with a clarifying statutory amendment one way or the other, which is unfortunately unlikely, but the absence of such legislative clarification again does not justify the DOE exceeding their statutory authority.

The DOE regulations also leave a number of the other employment eligibility issues that I have identified (and others that I have not mentioned) unaddressed. As a general matter, the regulations fail to clarify when the various services provided to members of the public qualify as “public” service. This is probably because of the (incorrect) decision discussed above to base program eligibility for employees of non-governmental and non-Code section 501(c)(3) employers upon the status of the employer rather than upon the nature of the services provided. In particular, the regulations provide no guidance as to what services would qualify as “public” education services, or whether that “education” must be administered in a school or school-like setting for the employment to qualify. They also do not clarify whether public services provided outside of the United States qualifies as a “public service job.”⁴⁵

The DOE regulations also do not grapple with the considerable difficulties that I have noted regarding which claimed public interest legal services are to be properly regarded under the statute as “law” services, and what “law” services are to be properly regarded as “public interest” law services, and whether the statutory (including...)

45. But the DOE has taken the position that public service employment by a foreign not-for-profit organization will qualify (presumably even if those services are provided outside of the U.S.) unless that foreign organization does not operate in the U.S. DOE Questions and Answers, *supra* note 43.

parenthetical listing of several forms of public interest legal services is to be regarded as exclusive or merely illustrative. These questions as to the proper scope of qualifying public interest legal services have nothing to do with the nature of the employer or the source of funding for the services, and they are the important ambiguities in the statute that need to be clarified by regulations. The current regulations imposing type-of-employer and source-of-funding restrictions that are not present in the governing statute are improperly constraining and are unhelpful with regard to these statutory ambiguities noted above.

Finally, let me note that there is no requirement in the statute—or even in the current DOE regulations—that, for employment by a non-governmental and non-Code section 501(c)(3) organization, providing a public service must be the *primary purpose* of an employer that provides a “qualifying public service” that qualifies as a “public service job.” This question of whether there is a “primary purpose of the employer” eligibility limitation for some employees providing public service is, however, an issue that has been raised in ABA-DOE litigation that I will discuss below.

My overall conclusion here is that the employment eligibility regulations that the DOE issued in 2008 to implement the PSLF program are incomplete and in some important ways inconsistent with the governing statute, although as I have noted above it could be argued that the DOE’s regulations are superior to the statutory criteria in promoting public service. Now that the coming flood of debt forgiveness applications under this program is almost upon us, additional regulations are needed which clarify the precise contours of the various forms of qualifying public service employment, and which discard the unnecessary concept of a public service organization which is both improperly restrictive in some regards and improperly permissive in others, and which also make clear that there is no requirement in the statute that the public services at issue be the primary purpose of the employer.

III. THE ABA-DOE LITIGATION

Under the Obama Administration, the DOE in 2016 contacted a number of persons who had previously received FedLoan Servicing certification, informing them that a period of their employment would qualify for debt forgiveness, and then retroactively rescinded those certifications based on a DOE determination that the certifications were made in error and that the employment did not qualify as a public service job. In response to these DOE actions the ABA, on December 20, 2016, filed a federal lawsuit on behalf of itself and four named individuals who had received such rescission notifications, seeking to reinstate those certifications.⁴⁶

Those four individuals had worked for Vietnam Veterans of America, the American Immigration Lawyers Association, the ABA, and ProBAR Children's Project, respectively.⁴⁷ As best as I can determine from the several pleadings filed in this case, the basis for these DOE determinations for three of the individuals was that the DOE had decided employment by these organizations did not qualify as a "public service job" because the public interest legal services provided by those individuals on behalf of their organizations were not the primary purpose of those organizations.⁴⁸ In the fourth instance, the DOE's action was apparently based on its determination that because the public education that the organization at issue had provided was not provided "in a school or school-like setting" it therefore did not qualify as "public education" under the statute.⁴⁹ This lawsuit is still in its very early stages, with only the ABA's complaint and DOE's summary denial-type answer,⁵⁰ and a subsequent

46. Complaint for Declaratory and Injunctive Relief at 1, *A.B.A. v. U.S. Dep't of Educ.*, No. 16-cv-02476-RDM (D.D.C. Dec. 20, 2016).

47. *Id.* at 7.

48. *Id.* at 22.

49. *Id.* at 30.

50. Defendants' Answer at 1, *A.B.A. v. U.S. Dep't of Educ.*, No. 16-cv-02476-

ABA summary judgment motion⁵¹ having been filed as of June 1, 2017. This trial could easily take a year or more before it is decided and the result will also likely be appealed by whichever party loses, further delaying the ultimate resolution of this question.

With the 2017 inauguration of President Donald Trump and the subsequent appointment of DOE Secretary Betsy DeVos, there will surely be major shifts in DOE policies. In particular, the Trump Administration's proposed fiscal year 2018 budget set forth in May of 2017 called for the prospective termination of the PSLF program for most post-July 1, 2018 Direct Loans,⁵² although it did not call for retroactive termination of the program with regard to existing Direct Loans, nor for any change in the tax treatment of debt forgiven under this program. The new Trump Administration policy orientation will undoubtedly moot some regulatory issues as some Obama Administration policy initiatives will be rescinded or scaled back. However, given the Trump Administration's proposal to prospectively abolish the PSLF program with regard to future Direct Loans, this earlier attempt under the Obama Administration to restrict the PSLF program's availability with regard to some current Direct Loan borrowers by imposing new and narrower interpretations of its regulations to rescind previously granted certifications is likely to be among the few Obama Administration actions that will find favor with the current Administration. I therefore expect the DOE will continue to vigorously contest this ABA challenge to those actions.

Based on my analysis, however, I have concluded that the ABA is virtually certain to prevail in this litigation. There is simply no basis for imposing a "primary purpose of

RDM (D.D.C. Mar. 23, 2017).

51. Plaintiffs' Motion for Summary Judgment at 1, *A.B.A. v. U.S. Dep't of Educ.*, No. 16-cv-02476-RDM (D.D.C. May 24, 2017).

52. Trump Proposed Budget (2017), *supra* note 23, at 20.

the employer” limitation on qualifying public interest law services activities to be found in the statute, or for that matter even in the existing DOE regulations. The DOE may be attempting to cut back somewhat on its broad grant of eligibility to all persons who work for public service organizations even if they do not provide public services in their employment. However, the better solution here is to go back and rescind this improperly broad grant of eligibility to all public service organization employees. The DOE should instead limit eligibility for persons not employed by a governmental body, or a Code section 501(c)(3) organization, as the statute calls for, rather than try to limit that overly broad eligibility criterion by another eligibility criterion “patch” that also lacks a statutory grounding.

The statute’s very general definition of a public service job arguably leaves the DOE with some discretion as to how to define “public education” services, but the DOE has not issued regulations in that regard, and the court may well decide that imposing a restrictive “school or school-like setting” requirement for “education” services with so little statutory basis for such a restriction without providing advance notice through a rulemaking and comment procedure is an abuse of its discretion.

All four of the employer organizations for which the DOE issued to employees the rescission of certification notices at issue in this litigation qualify under the DOE regulations as public service organizations. That litigation therefore does not challenge this definitional regulation as being inconsistent with the governing statute, either for being too broad or too restrictive as to eligibility. But the issue as to whether that definition is improperly restrictive is certain to be raised in subsequent class action litigation under the Administrative Procedures Act (APA)⁵³ once people begin to start receiving (or being denied) debt forgiveness.⁵⁴

53. 5 U.S.C. §§ 702, 704 (2012).

54. Persons who are denied debt forgiveness by the DOE, and who believe

Under the APA people have a right to judicial review of a final agency action for which they have no other adequate remedy.⁵⁵ The courts can then review a final agency regulation or other final action to determine if it exceeds the agency's statutory jurisdiction.⁵⁶ While the courts under *Chevron* generally give great deference to an agency's interpretation of its statutory jurisdiction,⁵⁷ such deference will not be given when the legislation directly and clearly addresses the question at issue.⁵⁸ As I have discussed, I believe that the statute is quite clear that if employees of non-governmental and non-Code section 503(c)(3) organizations provide statutorily-listed public services on a full-time basis then they hold public service jobs, so that no deference to the DOE's more restrictive regulatory interpretation is called for.

A reasonable argument can concededly be made that given the vagueness of the term "public" that appears several times in the statute the DOE should be given substantial leeway to define when particular services of one sort or another that are provided to members of the public qualify

that they qualify for debt forgiveness under the statute, as discussed in the text *infra*, will have standing to challenge the DOE decision. However, those persons who claim that they are injured by the DOE providing debt forgiveness to some borrowers outside of the statutory eligibility limitations, at the expense of the loss of future federal debt repayment revenues, will probably be denied standing to contest those grants of debt forgiveness on the basis that they have only the generalized interest in fiscally responsible governance shared by all citizens, and have not suffered a concrete and particularized injury meriting individual redress. See JARED COLE, CONG. RESEARCH SERV., R44699, AN INTRODUCTION TO JUDICIAL REVIEW OF FEDERAL AGENCY ACTION 6–7 (2016). The only remedy for impermissibly broad grants of debt forgiveness by the DOE may be Congressional action that clarified the statutory limitations and overrode the conflicting regulations. Such Congressional action would raise a difficult question as to the ability of the DOE to then reimpose debt repayment obligations on those persons whose debts had been wrongly discharged.

55. 5 U.S.C. §§ 702, 704.

56. 5 U.S.C. § 706(2)(c) (2012).

57. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–44 (1984).

58. *Id.* at 841–42.

as “public” services. However, as discussed above, this statutory vagueness calls for clarification as to the nature of each of the statutorily-listed qualifying services and provides no basis for the DOE to impose restrictions as to the providers of those services.

A challenge under the APA to the DOE’s “public service organization”-based employer eligibility limitations may encounter a threshold difficulty under the six-year statute of limitations that generally applies to civil actions against the federal government, since that regulation was adopted in 2008.⁵⁹ However, it could be argued in litigation initiated by a person who provides a qualifying public service, but is denied PSLF program eligibility in 2017 or later on the basis of not being employed by a “public service organization,” that his injury occurred when his application was improperly denied and not earlier when that regulation was first issued. It is arguably unfair that a person would be denied relief on the basis of the expiration of a statute of limitations years prior to their suffering injury and becoming aware of the regulatory overreach. If this statute of limitations hurdle can be surmounted and the court is able to reach the merits of this question, then, as I have discussed, that challenge is likely to be successful, given the clear statutory language, and the DOE regulation will then be invalidated if it has not been previously withdrawn.

The ABA-DOE litigation also raises another interesting question: if the DOE has indirectly, through a contractor, certified a period of employment as being qualifying public service for a particular applicant, should the DOE then be estopped from later changing this decision and rescinding that certification? At least with regard to those specific persons receiving those prior certifications if not also for other persons “similarly situated” with regard to their employment who have also received prior certifications,

59. 28 U.S.C. § 2401(a) (2012).

however broadly “similarly situated” is defined?⁶⁰ This potential issue will be mooted should the courts rule that the DOE’s bases for rescinding the prior employment certifications for those particular individuals joining the litigation are untenable under the statutory criteria, which I strongly expect will be the ultimate ruling, at least with regard to the “primary purpose” issue.

Should, however, the District Court or a subsequent appellate court surprisingly rule in favor of the DOE regarding either or both of its “primary purpose” or “school-like setting” arguments supporting their rescission of employment certifications, then that court will have to address the estoppel issue. This result here is difficult to predict. There is a substantial body of case law regarding regulatory estoppel, but it is inconsistent and fact-specific reflecting rather subjective and ad hoc judicial balancing of private and public interests.⁶¹ I will not conduct an analysis of this estoppel issue in this Article, since I believe it unlikely that this issue will be presented in this case. However, if the issue does arise it is not clear how the courts would balance, in this particular context, the reliance interest of the persons

60. “Similarly situated” could be defined narrowly to only include those persons who also provided public service on behalf of the same employer who have received employment certifications for that employment. Or the phrase could be defined much more broadly to include any persons who had previously received employment certification.

61. For discussion of these regulatory estoppel issues and the inconsistent jurisprudence in this area see generally Raoul Berger, *Do Regulations Really Bind Regulators?*, 62 NW. U. L. REV. 137 (1967); Harold J. Krent, *Reviewing Agency Action for Inconsistency with Prior Rules and Regulations*, 72 CHI. KENT L. REV. 1187 (1997); Peter Raven-Hansen, *Regulatory Estoppel: When Agencies Break Their Own ‘Laws’*, 64 TEX. L. REV. 1 (1985); Dorit Rubenstein Reiss, *Relying on Government in Comparison: What can the United States Learn from Abroad in Relation to Administrative Estoppel?*, 38 HASTINGS INT’L & COMP. L. REV. 75 (2015); Joshua I. Schwartz, *The Irresistible Force Meets the Immovable Object: Estoppel Remedies for an Agency’s Violation of its Own Regulations or Other Misconduct*, 44 ADMIN. L. REV. 653 (1992); Rodney A. Smolla, *The Erosion of the Principle that the Government Must Follow Self-Imposed Rules*, 52 FORDHAM L. REV. 472 (1984); Note, *Violations by Agencies of Their Own Regulations*, 87 HARV. L. REV. 629 (1974).

adversely affected by rescission of prior DOE assurances against the public interest in maintaining governmental regulatory flexibility and fiscal responsibility. There appears to be a real chance that estoppel would be granted, although the scope of such a ruling in terms of the number of persons affected beyond the specific parties to the litigation is difficult to predict.

IV. RECOMMENDATIONS FOR THE DOE

I offer several recommendations, and I hope that the DOE will seriously consider adopting some—or all—of these recommendations as soon as possible, hopefully well in advance of the coming surge of PSLF program debt forgiveness applications that may otherwise likely lead to much unnecessary litigation.

First, the DOE should let it be known to Congress that it would be very helpful if the governing employment eligibility statute was amended to clarify some of the many difficulties that it presents prior to the coming flood of debt forgiveness applications. Unfortunately, Congress as now constituted is not likely to respond favorably to this request. If then left to act on its own, the DOE should first of all immediately rescind the “public service organization” definition and then remove that phrase from the other employment eligibility-related regulations, since as I have discussed its use departs from the statutory directive as to eligibility in two opposite ways. First, there is no basis under the governing statute for imposing a restriction on debt forgiveness eligibility based on the characteristics of the employer. Only the nature of the services provided by the employee is relevant here; is the employee doing a full-time public service job? In addition, there is also no statutory basis for allowing persons who work for employers who are neither governments nor Code section 501(c)(3) organizations to be regarded as holding public service jobs if they are not “in” such work, if they do not themselves do public service work on a full-time basis even if other organization employees do so. This definition is

therefore likely to come under challenge once the DOE begins to grant or deny applications for debt forgiveness on this basis.⁶²

Second, the DOE should also immediately adopt a regulation clarifying that there is no "primary purpose of the employer" requirement for public service employment to qualify as a public service job, and then move to have the relevant portions of the current ABA-DOE litigation dismissed as mooted by that new regulation.

Finally, the DOE should as soon as reasonably possible set forth for public comment, and then adopt, in light of those comments, a series of carefully considered regulations clarifying the contours of each of the various statutorily-listed categories of qualifying public service. I have noted several of the major vaguenesses and ambiguities of the governing statute, particularly regarding what would qualify as public interest law services. The DOE should attempt to provide clear and workable guidance to persons seeking to determine whether certain types of public service employment will qualify for debt forgiveness under this program.

V. CONCLUSION

The Trump Administration is in a difficult position with regard to the PSLF program. Even if it is able to prospectively eliminate the program, as it has recommended in its fiscal year 2018 budget proposal, it would still be facing the prospects of multi-billion-dollar annual program costs over the next decade as large numbers of existing Direct

62. It is clear that persons who are denied eligibility for debt forgiveness because their public service employment was not done for the benefit of a "public service organization" would have standing to sue and an incentive to challenge the regulations. However, it appears unlikely that any person would have standing to contest the improper grant of debt forgiveness under the statute to a person who works for a public service organization that is not a government or a section 501(c)(3) organization, but whose work does not involve public service activities. 5 U.S.C. §§ 702, 704.

Loan borrowers qualify for tax-exempt debt forgiveness, with the benefits regressively skewed towards mid-career doctors and lawyers. However, given the reliance of hundreds of thousands or more borrowers now working in public service on being able to eventually have their remaining student loan debts forgiven, and without tax consequences, it would be politically (and perhaps also legally)⁶³ very difficult to retroactively terminate the program or remove the tax benefits by statute to avoid some or all of those costs, although such efforts may eventually be made.

The DOE's imposition of a public services organization employer limitation by regulation in 2008 in the waning days of the Bush Administration appears to be an early attempt to limit PSLF program debt forgiveness eligibility in the face of anticipated large budgetary costs, while as I have noted interestingly also broadening eligibility in some other ways. Yet, as I have shown, this regulatory definition and its application through other regulations is not consistent with the statutory employment eligibility criteria which do not limit eligibility on the basis of the nature of the employer, but only on the basis of the services provided, which, on the other hand, do require employees of certain organizations to directly provide public service to qualify for debt forgiveness. The public service organization definition and the utilization of that definition to narrow several other eligibility criteria and broaden others should therefore be rescinded as soon as possible.

The rescinding by the DOE in 2016 of some previously granted employment certifications appears to have been another attempt, this time by the Obama Administration and continued so far by the Trump Administration in the face of the ABA's challenge, to limit PSLF program eligibility (in this instance with a claimed "primary purpose of the employer" limitation for certain employers) without having to pass controversial retroactive legislation to that effect.

63. See generally Crespi, *supra* note 5.

However, I have concluded that this effort will probably fail. The courts in this ABA-DOE litigation will likely find this criterion to also be inconsistent with the statute and will not uphold the DOE's attempt to impose this limitation. The DOE should therefore clarify that there is no "primary purpose" employer limitation for non-governmental and non-Code section 501(c)(3) organization employers and move to dismiss the relevant portions of this litigation.

Given the great deference given by courts to regulatory interpretations of statutes,⁶⁴ the governing PSLF statute could arguably be interpreted to give the DOE the discretion to define when particular services are "public" services, and/or to limit qualifying public education employment to education that is provided in a school or school-like setting. The statute, similarly, could arguably be interpreted to allow the DOE to deny eligibility to employees of foreign governments and/or to some persons providing public services for foreign organizations.⁶⁵ Given that these constraints are not made obvious or even strongly suggested by the statute, the DOE should, perhaps, first be required under the APA to provide for public comment regulations to that effect before it began imposing any of these restrictions.

Finally, in the event that the courts in the ABA-DOE litigation do uphold one or both of the two bases articulated by the DOE for rescinding previously granted employment certifications, I believe that a strong argument can be made that the DOE should nevertheless be estopped from doing so, at least for those persons receiving those certifications and perhaps also for "similarly situated" persons who have also received certifications, however broadly that group is defined.⁶⁶

In conclusion, what the DOE should really be doing is to leave the difficult cost and benefit incidence issues posed by

64. See *Chevron*, 467 U.S. at 841-42.

65. DOE Questions and Answers, *supra* note 43.

66. See *supra* text accompanying note 60.

the PSLF program to the Administration and Congress to resolve. It should encourage Congress to so act, and make its preferences known and attempt to justify them. A favorable Congressional response is unfortunately unlikely anytime soon. But until there is Congressional action, the DOE should not continue to impose employment eligibility limitations (or expansions) through regulatory actions that go beyond its statutory mandate. It should rescind those statutorily-inconsistent regulations and instead make a serious effort to provide more detailed regulatory guidance to the public regarding exactly what forms of public service employment will qualify under the statute as a public service job that may lead to eventual debt forgiveness, particularly with regard to public interest legal services.